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82-271

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CARLOS CHARDON, ETC., *et al.*, *Petitioners*,

v.

JUAN FUMERO SOTO, *et al.*, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

K. MARTIN WORTHY, *Counsel of Record*
JOHN G. DEGOOYER
STEPHEN L. HUMPHREY
HAMEL, PARK, MCCABE & SAUNDERS
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 835-8000

HECTOR REICHARD DE CARDONA
Secretary of Justice

EDUARDO CASTILLO BLANCO
Assistant Secretary

INES EGUIA DE CASANOVA
Attorney

DEPARTMENT OF JUSTICE
OF PUERTO RICO
P.O. Box 192
San Juan, Puerto Rico 00902
Counsel for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Whether the rule established by this Court in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), that the filing of a purported class action in federal court suspends the running of the statute of limitations for unnamed class members until a decision is reached whether to certify the class, and that following a denial of certification the statute resumes running again, is applicable to a purported class action brought in federal court seeking relief under 42 U.S.C. § 1983.

2. Whether this Court's decision in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), precludes application of the rule of *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), to purported class actions brought in federal court seeking relief under 42 U.S.C. § 1983.

3. Whether under this Court's holding in *Chardon* v. *Fernandez*, 454 U.S. 6 (1981), for purposes of determining when the statute of limitations begins to run, a cause of action under 42 U.S.C. § 1983 alleging a discriminatory decision not to reappoint an employee to a non-permanent position accrues at the time the employee is orally notified of such non-reappointment, where the employee has declared in a sworn statement filed with the district court that through such oral notice he was informed of the non-reappointment decision and that subsequent written notice served only to confirm such oral notice.

PARTIES TO THE PROCEEDING

The Petitioners are Carlos Chardon, individually, Maria Socorro Lacot, as the current Secretary of Public Education for the Commonwealth of Puerto Rico*, and Oscar Ramos, individually and as the Assistant Secretary of Personnel for the Department of Education of the Commonwealth of Puerto Rico.

Petitioners request a writ of certiorari to the Court of Appeals for the First Circuit to review the judgment entered in favor of the following thirty-seven respondents, whose cases were considered in one appeal below, Nos. 81-1567 and 81-1607:

1. Aurora Sierra Pizarro
2. Virginia Otero Arroyo
3. Juan Fumero Soto
4. Dora Castro de Aguilar
5. Reinaldo Rodriguez Solivan
6. Elba Rosario de Bravo
7. Ramon Norat Zayes
8. Charles H. Quiles Mariani
9. Bienvenido Rivera Diaz
10. Carmen M. Morales Hernandez
11. Juan Rivera Pagan
12. Joaquin Cruz Mendez
13. Ursula Aguilar Quintero
14. Aminta Rivera Cardona
15. Roberto Cruz Cruz
16. Nelson Velez Quinones
17. Cristina Cancel Cuevas
18. Maria D. Guerra Navarro

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* By automatic substitution when Mr. Chardon, who was sued individually and as Secretary of Education, resigned his position.

19. Francisco Bonilla Ocasio
20. Heriberto Gallardo Gutierrez
21. Julio E. Colon
22. Aida Rodriguez Rios
23. Jose Ortiz Rivera
24. Carmen Nunez Rivera
25. Carmen L. Negron Marin
26. Carmen Garcia Rosado
27. Noelia Torres de Cantres
28. Antonio Rodriguez Rivera
29. Jose E. Aponte de la Torre
30. Carmen H. Montez Velez
31. Nilsa Cardona Flores
32. Elba M. Colon Torres
33. Ana Mercedes Ortiz Colon
34. Sylvia M. Denis
35. Bienvenido Castro del Valle
36. Santiago Gonzalez Velasquez
37. Angela Colon Santiago

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CARLOS CHARDON, ETC., *et al.*, *Petitioners*,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit entered in favor of the thirty-seven respondents herein on June 8, 1982, as modified on rehearing on July 6, 1982.

OPINIONS BELOW

The opinion of the court below dated June 8, 1982, has not been reported, but is reproduced in the Appendix hereto, 7a-37a. The order issued by the court below on July 6, 1982, modifying its opinion of June 8, 1982, is reproduced in the Appendix, 3a-4a. The orders of the court below entered on July 6, 1982, and July 28, 1982, denying petitioners' petitions for rehearing, are reproduced in the Appendix, 5a-6a and 1a-2a. The May 7, 1981 Memorandum Opinion of the United States District Court for the District of Puerto Rico, which was reviewed on appeal by the court below, is reported at 514 F. Supp. 339 (D.P.R. 1981) and reproduced in the Appendix,

51a.-73a. The District Court's unreported Order of May 7, 1981, which accompanied the foregoing Memorandum Opinion, is reproduced in the Appendix, 48a-50a. Also reproduced are the District Court's Order, Appendix 43a-47a, and Final Order and Judgment, Appendix, 38a-42a, both dated July 24, 1981.

JURISDICTION

The judgment of the court below was entered on June 8, 1982. Petitioners timely filed a Petition for Rehearing, which the court below denied on July 6, 1982. Appendix, 5a-6a. Eight of the respondents timely filed a Petition for Rehearing and Modification of Judgment, which the court below granted on July 6, 1982, and modified its opinion accordingly. Appendix, 3a-4a. Petitioners thereafter timely filed a Petition for Rehearing on Modification of Judgment, which the court below denied on July 28, 1982. Appendix, 1a-2a. This petition for writ of certiorari was filed on August 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 (Supp. IV 1980)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

These thirty-seven consolidated cases are related to the cases decided by this Court last term in *Chardon* v. *Fernandez*, 454 U.S. 6, 102, S.Ct. 28 (1981), and arose out of essentially the same facts. Appendix, 9a.[1]

As in *Fernandez*, the petitioners here are Carlos Chardon, individually, Maria Socorro Lacot, as the current Secretary of Public Education (by automatic substitution when Mr. Chardon resigned that position), and Oscar Ramos, individually and as the Assistant Secretary for Personnel of the Department of Education.

Like the respondents in *Fernandez*, the respondents here held non-tenured administrative positions in the Puerto Rico Department of Education for the 1976-77 school year. Appendix, 9a. These respondents were notified—one on May 27, 1977,[2] and the others on or after June 17, 1977—that their appointments would not be renewed for the 1977-78 school year and that, instead, they would be reinstated to the tenured teaching posi-

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[1] In *Fernandez*, this Court reversed the judgments previously entered by the Court of Appeals for the First Circuit and remanded the cases for further proceedings. 454 U.S. at ____, 102 S.Ct. at 29. On remand, the Court of Appeals decided the *Fernandez* cases and the instant *Fumero Soto* cases in the same opinion. Appendix, 8a-9a.

[2] Respondent Ortiz Rivera was orally notified on that date that his appointment would not be renewed. Appendix, 81a-82a. In sworn testimony in the District Court, Ortiz Rivera said that written notification, which he received thereafter, confirmed what he had already been told on May 27. Appendix, 81a-83a. Petitioners contended in the court below that, under this Court's ruling in *Fernandez*, *supra*, Ortiz Rivera's cause of action accrued on May 27, 1977, but the Court of Appeals rejected this contention. Appendix, 5a-6a. See argument, *infra*, at 13-16.

tions they had held previously in the Department. Appendix, 10a.

On June 19, 1978, Jose Ortiz Rivera, one of the respondents herein, filed a purported class action against Chardon and Ramos in the United States District Court for the District of Puerto Rico. Appendix, 10a. Ortiz Rivera claimed that the Department of Education had failed to reappoint him, and the members of the class he purported to represent, because of their political affiliation. Ortiz Rivera sought relief under 42 U.S.C. § 1983. Appendix, 10a. Jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331, 1343(3) and (4), 2201 and 2202.

On August 21, 1978, the District Court denied class certification on the ground that the class was not so numerous as to make joinder impracticable. Appendix, 11a. More than four months later, on dates ranging from January 10 to January 31, 1979, ninety individual plaintiffs, including the remaining thirty-six respondents herein, filed separate complaints, each making essentially the same claims, thus bringing to ninety-one the total number of related cases then pending in the District Court. Chardon and Ramos filed separate answers in each case, and in each such answer stated as an affirmative defense that the action was barred by the applicable statute of limitations. Appendix, 13a.

In Puerto Rico, the limitations period applicable to a claim under 42 U.S.C. § 1983 is one year. 31 L.P.R.A. § 5298(2). Appendix, 13a. The District Court thus dismissed thirty-six cases as time-barred. Appendix, 12a. In each of those cases the plaintiff had received notice of the non-reappointment decision more than one year before

Ortiz Rivera filed his purported class suit.[3] These thirty-six cases, then, became the *Fernandez* cases, in which the Court of Appeals for the First Circuit held that the limitations period began to run not when notice of non-reappointment was received, but when the plaintiffs' appointments ended. *Fernandez* v. *Chardon*, 648 F.2d 765 (1st Cir. 1981). This Court reversed, holding that the plaintiffs' causes of action under 42 U.S.C. § 1983 accrued on the dates that they were "notified . . . that a final decision had been made to terminate their [temporary] appointments." *Chardon* v. *Fernandez*, 454 U.S. at ____, 102 S.Ct. at 29. As noted above, this Court remanded the thirty-six *Fernandez* cases for further proceedings.

After the *Fernandez* cases had been dismissed by the District Court, and while those cases were on appeal, the remaining fifty-five individual cases—the *Fumero Soto* cases—were consolidated for trial. Appendix, 12a. The District Court bifurcated the trial into liability and damage phases, and reserved its decision on the statute of limitations defense in all fifty-five cases. Appendix, 12a. After trial in January 1981, the jury returned a verdict in favor of all fifty-five plaintiffs on the question of liability. Appendix, 12a. Thereafter, in light of the jury's answers to certain special interrogatories, the District Court found Chardon and Ramos immune from liability individually, but ordered the Department of Education to reinstate all the plaintiffs to their previous administrative positions with full back pay. Appendix, 12a-13a. Judg-

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[3] Thus, the filing of the purported class action could have had no tolling effect on the running of the statute of limitations for those thirty-six plaintiffs.

ments were entered accordingly.[4] Appendix, 38a-42a. Petitioners herein appealed on the ground that, *inter alia*, all the suits were filed after the statute of limitations had expired and thus were time-barred.[5] Respondents cross-appealed contending that the defendants below did not enjoy individual immunity.

The court below issued its opinion on June 8, 1982, disposing of the cross-appeals in the fifty-five *Fumero Soto* cases, as well as the thirty-six *Fernandez* cases then before the court on remand.[6] With respect to the *Fernandez* cases, the court vacated the judgments it had previously entered and remanded those cases to the District Court with instructions to dismiss. Appendix, 37a. With respect to the *Fumero Soto* cases, the court reversed the judgment entered by the District Court in twenty-six of the fifty-five cases and remanded those cases with instructions to dismiss. In those twenty-six

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[4] The District Court, in entering judgment, necessarily rejected the statute of limitations defense on which it had reserved decision prior to trial.

[5] Petitioners also appealed on the grounds that the District Court erred in refusing to enter judgment for them notwithstanding the verdict, and that the back pay award entered against the Department of Education violated the Eleventh Amendment to the United States Constitution. The court below did not find error in the District Court's refusal to grant judgment notwithstanding the verdict, but reversed the back pay award, finding it in violation of the Eleventh Amendment. Appendix, 30a, 36a.

[6] After this Court issued its decision in *Fernandez*, the court below directed the parties to submit briefs on the question whether the statute of limitations had been tolled in any of those thirty-six cases and whether that issue should be certified to the Supreme Court of Puerto Rico. The court concluded that no tolling had occurred, and that the issue did not need to be certified. Appendix, 30a, 34a.

cases, the plaintiffs were in precisely the same position as the thirty-six plaintiffs in *Fernandez* and were therefore found to be time-barred. Appendix, 27a.

As to the remaining twenty-nine *Fumero Soto* plaintiffs, who had received notice after June 19, 1977, the court found their suits to have been timely filed. Appendix, 27a.[7] To reach that result the court held that the filing of the class suit by Ortiz Rivera tolled the running of the statute of limitations as to unnamed class members, but that, after class certification was denied, each unnamed class member then had another full year within which to bring suit. Appendix, 18a.

Chardon and Ramos timely petitioned the court below for rehearing on the grounds that the court erred in holding that the denial of class certification caused the one-year limitations period to begin running anew, and that Ortiz Rivera's own suit was untimely since he had received notice more than one year before his complaint was filed. The court denied the petition on July 6, 1982. Appendix, 5a-6a.

Eight of the *Fumero Soto* plaintiffs whose judgments had been reversed also petitioned for rehearing on the ground that their complaints were not time-barred, even though they had received notice on June 17, 1977. They argued that since June 17, 1978—the date on which the one-year limitations period expired in their cases—fell on a Saturday, they were entitled under Puerto Rico law to benefit from the filing of the class suit on Monday, June

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[7] Their cases were remanded to the District Court for assessment of compensatory damages against the individual defendants, Chardon and Ramos. Appendix, 37a.

19, 1978. Without offering defendants an opportunity to respond, the court below granted plaintiffs' petition and modified its judgment accordingly, thus bringing to thirty-seven the number of plaintiffs held to have timely filed their complaints. Appendix, 3a-4a. Chardon and Ramos petitioned for rehearing on the modification of judgment pointing out that, contrary to respondents' contentions, Saturdays are not excluded under Puerto Rico law from computation of a statute of limitations period.[8] Petitioners simultaneously moved the court for a stay of mandate pending application to this Court for a writ of certiorari. The court on July 28, 1982, denied the petition,[9] but granted the stay of mandate on the condition that application for the writ be filed by August 16, 1982. Appendix, 1a-2a.

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[8] The plaintiffs had advanced as authority for their position, 1 L.P.R.A. § 72, which provides:

> "The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded."

Plaintiffs, however, failed to mention, or even acknowledge, 1 L.P.R.A. § 71, which defines "[h]olidays, within the meaning of sections 71-73" of Title 1. Saturdays are not included in that definition.

[9] In denying this petition, the court below held that the federal rules controlled, noting that F.R.Civ.P. 6 expressly excludes Saturday from such computations, and that F.R.App.P. 26 contains the same exclusion. Appendix, 1a-2a.

REASONS FOR GRANTING THE WRIT

I. In Holding That The Individual Complaints Of Unnamed Class Members Were Timely Filed, The Court Below Failed To Follow Two Controlling Decisions Of This Court.

In *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), this Court held that the filing of a federal class action tolls the running of the statute of limitations for all purported class members until a decision is made whether to certify the class. If certification is denied, the statute resumes running and the individual class members then have whatever time remained in the limitations period when the class suit was filed within which to move for permission to intervene. 414 U.S. at 560-61.

In *American Pipe*, this Court noted specifically that it was addressing "an aspect of the relationship between a statute of limitations and the provisions of Fed. Rule Civ. Proc. 23 regulating class actions in the federal courts." 414 U.S. at 540. The rule adopted by this Court was described as "the rule most consistent with federal class action procedure." 414 U.S. at 554. Numerous courts have applied the rule of *American Pipe* as a rule of general applicability to class actions brought in federal court, including actions brought under 42 U.S.C. § 1983.[10]

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[10] For instance, *American Pipe* has been applied, or its principles have been distinguished on the facts, in Title VII cases, *e.g.*, *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 391-92 (1977); *Parker* v. *Crown, Cork & Seal Co., Inc.*, 677 F.2d 391 (4th Cir. 1982); *Jefferson* v. *H. K. Porter Co.*, 485 F. Supp. 356, 360-61 (N.D.Ala. 1980), *aff'd*, 648 F.2d 337 (5th Cir. 1981); *Green* v. *United States Steel Corp.*, 481 F. Supp. 295 (E.D.Pa. 1979); in an I.C.C. rate refund enforcement action, *Appleton Electric Co.* v. *Graves Truck Line, Inc.*, 635 F.2d 603, 609-10 (7th Cir. 1980), *cert. denied*, 451 U.S. 976 (1981); in an action under the Truth-In-Lending Act, *Bantolina* v. *Aloha Motors*,

The court below clearly recognized that if the rule of *American Pipe* were applied in the instant cases, all of the unnamed class members would be time-barred:

> "Under *American Pipe*, the one-year statute of limitations would have been tolled on June 19, 1978, when Ortiz Rivera filed his class action. The tolling would have ended, and the remaining portion of the limitations period would have recommenced running on August 21, 1978, when the district court declined to certify the class. Over half of the plaintiffs in [the *Fumero Soto* and *Fernandez* cases combined] had received notice of demotion more than one year before Ortiz Rivera filed suit, so their claims would already have been time-barred. *The remaining plaintiffs would have had from one to one hundred and thirty-eight days to file individual complaints after August 21, 1978. The earliest individual com-*

Inc., 75 F.R.D. 26, 32-33 (D.Hawaii 1977); in an action seeking benefits under the Social Security Act, *Wright* v. *Califano*, 603 F.2d 666, 669 n. 8 (7th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); in a wrongful death action brought under the Suits In Admiralty Act, *Stoddard* v. *Ling-Temco-Vought, Inc.*, 513 F. Supp. 314, 329 (C.D.Cal. 1980); in an action under state and federal banking statutes, *Haas* v. *Pittsburgh National Bank*, 526 F.2d 1083, 1096-98 (3d Cir. 1975); in actions involving alleged violations of the securities laws, *Stull* v. *Bayard*, 561 F.2d 429 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *Arneil* v. *Ramsay*, 550 F.2d 774 (2d Cir. 1977); *Wachovia Bank & Trust Co.* v. *National Student Marketing Corp.*, 461 F. Supp. 999, 1011-12 (D.D.C. 1978), *rev'd on other grounds*, 650 F.2d 342 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954, (1981); and, finally, in actions brought under 42 U.S.C. § 1983, *Paxman* v. *Campbell*, 612 F.2d 848, 855 (4th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1129 (1981); *McCarthy* v. *Kleindienst*, 562 F.2d 1269, 1272-75 (D.C. Cir. 1977); *Morton* v. *Charles County Board of Education*, 373 F. Supp. 394 (D.Md. 1974), *aff'd*, 520 F.2d 871 (4th Cir.), *cert. denied*, 423 U.S. 1034 (1975). *See also*, *Pavlak* v. *Church*, 51 U.S.L.W. 2068 (9th Cir. July 14, 1982).

> *plaints were not filed, however, until January 10, 1979, after expiration of the remaining one hundred and thirty-eight day period.*" Appendix, 14a; emphasis added.

Although the court correctly stated the rule of *American Pipe*, and clearly understood what it would mean to apply that rule in these cases, it nevertheless erroneously created an exception to that rule for class actions brought under 42 U.S.C. § 1983. Appendix, 17a. In that respect the court below failed to follow *American Pipe*.

In refusing to apply the rule of *American Pipe*, the court below cited *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), as requiring that "Puerto Rican tolling rules, rather than the federal rule of *American Pipe* . . . apply, unless they are inconsistent with federal law."[11] Appendix, 15a. Contrary to the suggestion of the court below, this Court's decisions in *Tomanio* and *American Pipe* are not in conflict. Indeed, in *Tomanio*, this Court, in considering the relationship between state and federal law in actions brought under § 1983, stated:

> "In § 1988, Congress 'quite clearly instructs [federal courts] to refer to state statutes' *when federal law provides no rule of decision for actions brought under § 1983.*" 446 U.S. at 484-85, *citing Robertson* v. *Wegmann*, 436 U.S. 584 (1978); emphasis added; citation and footnote omitted.

American Pipe clearly provides the applicable "rule of decision" for class actions brought in the federal courts.

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[11] This finding stands in marked contrast to the court's holding that the Federal Rules control on the question of how the limitations period is to be computed. Appendix, 1a.

Thus, in refusing to apply that rule in these cases, the court below failed to follow *Tomanio.*[12]

In any event, even when the court below looked to Puerto Rico law, as it felt constrained to do, it found "no discernible state rule" applicable to federal class actions brought under 42 U.S.C. § 1983. Appendix, 17a. Yet, apparently compelled to find some basis on which to hold the suits timely filed, the court below created a "state rule" with that effect. It did so by borrowing from *American Pipe* only the tolling or suspension principle of that holding. It rejected the balance of the rule of *American Pipe* and, instead, added a novel and unprecedented interpretation of Puerto Rico law, so as to extend the statute of limitations beyond the dates on which the respondents' individual complaints were filed. Thus, the court below declared that the filing of the class suit by Ortiz Rivera on June 19, 1978, stopped the statute of limitations from running against the other respondents herein[13] and that, when class certification was denied on August 21, 1978, each such respondent thereupon acquired a whole new year within which to file a separate lawsuit. Appendix, 18a. Given that whole new year, the

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[12] The effect of the Court of Appeals' holding is to remove from the application of *American Pipe only* federal class actions brought under 42 U.S.C. § 1983. Such an exception is unjustified and unwise; has never been sanctioned by this Court; and directly conflicts with this Court's holding in *American Pipe.* In any event, to the extent that this Court perceives a need to reconcile its holdings in *American Pipe* and *Tomanio,* this case presents an appropriate vehicle for that purpose.

[13] Whether Ortiz Rivera's suit was itself timely filed is addressed *infra,* at 13-16.

complaints filed by respondents in January 1979 were found to be timely.[14]

These failures of the court below to follow *American Pipe* and *Tomanio* warrant full review and reversal by this Court.

II. In Holding That Ortiz Rivera's Complaint Was Timely Filed, The Court Below Failed To Follow A Controlling Decision Of This Court.

In *Chardon* v. *Fernandez*, 454 U.S. 6 (1981), this Court held that respondents' causes of action under 42 U.S.C. § 1983 accrued when notice was received that a final decision had been made to terminate their appointments. 454 U.S. at ____, 102 S.Ct. at 29. In reaching that decision, the Court applied its decision in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), which it found to be "indistinguishable" from the *Fernandez* case.

The court below well understood the application of *Ricks* and *Fernandez* to the instant cases, stating:

> "[T]he crux of a § 1983 action is a discriminatory act, and in an employment case, this act occurs—and the

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[14] This Court has cautioned the lower federal courts against unwarranted adoption of whichever law, state or federal, would preserve the rights of plaintiffs in actions brought under 42 U.S.C. § 1983. Thus, in *Robertson* v. *Wegmann*, 436 U.S. 584 (1978), in an admittedly different context, this Court stated:

> "If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant." 436 U.S. at 593.

The court below has disregarded this admonition in its search for a rule favoring respondents.

> limitations period begins to run—when notice of termination or demotion is given . . ." Appendix, 22a.
>
> * * *
>
> "The date of notice of termination is the triggering date under *Ricks* and *Rivera Fernandez* . . ." Appendix, 26a.

The court, however, refused to apply the foregoing principle in determining whether Ortiz Rivera's suit itself was timely filed.

In a sworn statement filed with the District Court, Ortiz Rivera stated that he was notified on May 27, 1977, over a year before he filed his suit on June 19, 1978, that a final decision had been made not to renew his temporary appointment for the 1977-78 school year. Appendix, 81a-83a. According to the statement, he visited the School Superintendent for his District on May 27, 1977, to advise her "in writing" that he "wished to return" to his tenured position as classroom teacher for the 1977-78 school year, and thus did not wish to have his temporary appointment renewed. Appendix, 81a-82a. During that visit, however, he was advised that his written request was not necessary "since it had already been determined" that his temporary appointment as school director would not be renewed, and that he "was going to be assigned to [his] permanent position of school teacher." Appendix, 82a.

Prior to this Court's decisions in *Ricks* and *Fernandez*, the District Court, in ruling on a motion to dismiss Ortiz Rivera's suit as time-barred, held that it was "unclear from the record" whether, when Ortiz Rivera received notice on May 27, 1977, that he "knew or should have known, of the [alleged] illegal motivations behind the decision to return him to his previous position." Appen-

dix, 79a. The court held that a cause of action of "[t]he present type" does not accrue until the date plaintiff "is *officially informed* that he is being demoted and he is aware of the reasons for this demotion." Appendix, 79a; emphasis added. In Ortiz Rivera's case, the District Court ruled that he was "officially informed" on June 21, 1977.[15] The court below upheld that ruling.

That ruling constitutes a substantial departure from this Court's decisions in *Ricks* and *Fernandez*. In *Ricks*, the Court stated that "the only alleged discrimination occurred—and the filing limitations therefore commenced—at the time the tenure decision was made and communicated to Ricks." 449 U.S. at 258. Similarly, in *Fernandez*, this Court looked to the date respondents were "notified . . . that a final decision had been made to terminate their appointments."[16] 454 U.S. at ____, 102 S.Ct. at 29. Under the decisions in *Ricks* and *Fernandez*, there is no basis for the court below to have rejected the notice Ortiz Rivera received from the School Superintendent on May 27, 1977—particularly since the notice received on that date, according to Ortiz Rivera's own

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[15] Relying on a June 21, 1977 "date stamp" placed on the June 10 letter, the court held that Ortiz Rivera's cause of action accrued on June 21 and that his suit was therefore timely. Nowhere in the record is there any evidence that Ortiz Rivera in fact received the letter on June 21. Indeed, it is significant that his sworn statement omits any such claim; to the contrary, it states explicitly "*I was demoted or removed from the position . . . on June 10, 1977* . . . as per letter dated on said date . . ." Appendix, 81a; emphasis added. Thus the only two dates of notice for which there is any support in the record (May 27 and June 10, 1977) establish conclusively that Ortiz Rivera's suit was not timely filed.

[16] Indeed, the court below recognized that "[t]he date of notice of termination is the triggering date . . ." Appendix, 26a.

sworn statement, constituted, in his mind, notice of the non-reappointment decision.[17]

In the instant case, the Department's decision was communicated to Ortiz Rivera on May 27, 1977 and his cause of action accrued on that date. Thus his suit, brought more than one year thereafter, was untimely.[18] In holding to the contrary, the court below failed to follow this Court's decision in *Fernandez*.[19] Full review and reversal by this Court is warranted accordingly.

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[17] This Court need not reach the hypothetical question whether oral notice is sufficient in all cases to mark the accrual of a cause of action under Section 1983. Here Ortiz Rivera received his notice from his superior, the School Superintendent, and expressly declared in his sworn statement to the District Court that it was through that communication that he was notified of the non-reappointment decision. Appendix, 81a-83a.

[18] Of course, since the class suit was not timely filed, it could not have had the tolling effect attributed to it by the court below. Indeed, since Ortiz Rivera's cause of action was time-barred, he was not a member of the class he sought to represent and thus could not have acted as a class representative. *Cf. Weinberger* v. *Retail Credit Co.*,498 F.2d 552, 556 (4th Cir. 1974), *explained in, In re Independent Gasoline Antitrust Litigation*, 79 F.R.D. 552, 558 n.4 (D.Md. 1978); *see also Sosna* v. *Iowa*, 419 U.S. 393, 403 (1975); *Bailey* v. *Patterson*, 369 U.S. 31, 32-33 (1962).

[19] Furthermore, the ruling of the court below on this point is in conflict with the decision of the Court of Appeals for the Fifth Circuit in *McWilliams* v. *Escambia County School Board*, 658 F.2d 326, 328-30 (5th Cir. 1981). In that case, the court held that a cause of action under Section 1983 for employment discrimination accrued when it became "apparent" through an oral communication that the plaintiff/teacher's temporary appointment would not be renewed for the following school year. Noting that its decision was consistent with *Ricks*, the court stated:

> "If the complainant knows or reasonably should know that the challenged act has occurred, the employer necessarily has made its decision and communicated it to the complainant." 658 F.2d at 328 n. 1.

CONCLUSION

For these reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

K. MARTIN WORTHY, *Counsel of Record*
JOHN G. DEGOOYER
STEPHEN L. HUMPHREY
HAMEL, PARK, MCCABE & SAUNDERS
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 835-8000

HECTOR REICHARD DE CARDONA
Secretary of Justice

EDUARDO CASTILLO BLANCO
Assistant Secretary

INES EGUIA DE CASANOVA
Attorney

DEPARTMENT OF JUSTICE
OF PUERTO RICO
P.O. Box 192
San Juan, Puerto Rico 00902
Counsel for Petitioners